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CLERK U.S. BANKRUPTCY COURT  
Central District of California  
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**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
LOS ANGELES DIVISION**

In re:

Cosmic Tophat, LLC,

Debtor(s).

Case No.: 2:14-bk-10674-NB

CHAPTER 7

**MEMORANDUM DECISION (1) GRANTING  
MOTION FOR CONTEMPT AS AGAINST  
THE DEBTOR AND (2) DENYING MOTION  
AND DISCHARGING ORDER TO SHOW  
CAUSE AS TO RESPONDENT JOHANN  
KUBEL ONLY**

Date: December 30, 2014

Time: 2:00 PM

Courtroom: 1545

At the date, time and place set forth above, this court held a hearing on its order to show cause why the above-captioned debtor, Cosmic Tophat, LLC ("Debtor") and its principal, Johann Kubel ("Kubel") should not be held in contempt (dkt. 45, the "OSC"). Appearances were as noted on the record. This court having reviewed the motion for order to show cause re: contempt (dkt. 42-43), Kubel's response to the OSC (dkt. 51-52, together, the "Opposition"), and based upon the statements made by the parties on //

the record at the above-captioned hearing, and for the reasons set forth on the record at the hearing and further set forth below, finds and concludes as follows.

**A. BACKGROUND**

**1. Key Pleadings.**

On August 12, 2014, Insituform Technologies, LLC and INA Acquisition Corp. (together, “Movant”) filed the “Motion for Examination Under FRBP 2004 of Debtor Cosmic Tophat, LLC (dkt. 25, the “Examination Motion”). The Examination Motion requested (1) that a representative of Debtor be directed to appear for examination and (2) that Debtor produce certain documents. On August 14, 2014, this court entered its order granting the Examination Motion (dkt. 31, the “Examination Order”).

Debtor did not comply with the Examination Order and on November 6, 2014, Movant filed the “Motion for Order to Show Cause Why Debtor Cosmic Tophat, LLC and Principal of Debtor Johann Kubel Should Not be Held in Contempt for Failure to Comply with Order Granting Motion Under FRBP 2004” (dkt. 42, together with dkt. 43, the “Contempt Motion”). On November 21, 2014, this court entered its “Order to Show Cause Why Debtor Cosmic Tophat, LLC and Principal of Debtor Johann Kubel Should Not be Held in Contempt for Failure to Comply with Order Granting Motion Under FRBP 2004” (dkt. 45, the “OSC”).

**2. Service.**

The Examination Motion, according to the attached proof of service, was served on Debtor and its counsel of record. The Examination Order was also served on Debtor and its counsel of record via BNC noticing (dkt. 33).

The Contempt Motion, according to the attached proof of service, was served on Debtor; Debtor’s counsel of record; and the (former? – see dkt. 43-5, p. 28) managing member of Debtor, Mr. Chris Scarrett (“Scarrett”); and was mailed via regular international mail to Mr. Johann Kubel (“Mr. Kubel”) in Austria. The OSC was served on Debtor and its counsel of record via BNC noticing (dkt. 48). Movant filed a proof of service showing service of the OSC on Debtor, Debtor’s counsel in certain non-

bankruptcy litigation, Mr. Daniel Kent (“Kent”) and Scarrett, and was sent to Kubel via regular international mail (dkt. 47).

**B. EXAMINATION ORDER**

**1. Debtor is in contempt of the Examination Order.**

The Examination Order directed *Debtor* to produce certain documents and appear for examination, as follows:

Insituform is authorized to conduct an examination of ***Debtor Cosmic Tophat, LLC...Cosmic Tophat, LLC*** shall appear at Thompson Coburn...by ***its*** designated representative(s) to provide testimony...***Cosmic Tophat, LLC*** shall produce documents responsive to the document requests.... [Dkt. 31, emphasis added]

Debtor failed to respond to the Examination Motion, placing itself in contempt of the Examination Order. Whether Kubel is in contempt of the Examination Order is a separate issue, addressed below.

**2. Kubel has not been shown, on the present record, to be in contempt.**

At the above-captioned hearing, Movant’s counsel argued that a recent Ninth Circuit decision (*Institute of Cetacean Research v. Sea Shepherd Conserv. Soc.*, 2014 WL 7235539 (9th Cir. Dec. 19, 2014)) supports a finding that individuals who control organizations (in that case, limited liability corporations) can be held in contempt for the failure of their organizations to abide by court orders. Specifically, the Ninth Circuit in *Cetacean* held:

The law is clear that those who control an organization may be held liable if they fail to take appropriate action to ensure compliance with an injunction: A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt. [*Id.* at \*17 (*quoting Wilson v. United States*, 221 U.S. 361, 376 (1911))]

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1 This court is not persuaded by one argument advanced by Kubel. He contends  
2 in his declaration that he is “not a representative of Debtor” (*Id.* at p. 10:18-19). Movant,  
3 however, has presented evidence that Kubel is the sole stockholder of Debtor and as  
4 such he would come within the holding of *Cetacean*, regardless of how much actual  
5 control he chose to exercise, if he had had notice of the Examination Motion and  
6 Examination Order in time to comply with that Order.

7 On the present record, however, this court is not persuaded that Kubel had such  
8 notice. In *Cetacean* the Ninth Circuit noted that there was “no dispute that the individual  
9 board members knew of the injunction” at issue in that case. *Id.* at \*17. Unlike  
10 *Cetacean*, here a dispute certainly exists as to whether Kubel knew of the Examination  
11 Order. As set forth above, the record before this court demonstrates that Kubel was not  
12 served with either the Examination Motion or the Examination Order. Kubel himself  
13 asserts that he did not have any notice of the Examination Motion and claims that the  
14 OSC is “the first document [he] received relating to [the] 2004 examination of Debtor.”  
15 Dkt. 51, p. 10:15-17.

16 This court does not interpret *Cetacean* to hold that notice of an order or motion to  
17 a corporation results in implied service upon its principal(s), and this court is not aware  
18 of any other authority so holding. Accordingly, it does not appear that either (a) Movant  
19 properly served or (b) that Kubel was made aware of the Examination Motion or the  
20 Examination Order. All of these factors distinguish the Ninth Circuit’s holding in  
21 *Cetacean*, and this court does not find that authority persuasive for the position asserted  
22 by Movant that Kubel is in contempt of the Examination Order.

### 23 **C. ORDER TO SHOW CAUSE**

24 Other arguments advanced by Kubel are unpersuasive. In the Opposition, Kubel  
25 argues that this court lacks jurisdiction over him. This court disagrees.

26 As set forth above, “[a] command to the corporation is in effect a command to  
27 those who are officially responsible for the conduct of its affairs.” *Cetacean*, 2014 WL  
28 7235539 at \*17 (*quoting Wilson*, 221 U.S. at 376). While Kubel asserts that he is not a

1 “representative” of Debtor, and was not involved in the “day-to-day operations” and did  
2 not “maintain Debtor’s books and records” (dkt. 51, p. 10:17-18), Kubel cannot use  
3 those things to evade the fact that he is ultimately in “control” of Debtor and “officially  
4 responsible” for Debtor within the meaning of *Cetacean*. Debtor’s Statement of  
5 Financial Affairs (dkt. 1, p. 26) lists Kubel as the 100% owner of Debtor, and Kubel  
6 signed the Corporate Ownership Statement filed by Debtor (dkt. 1, pp. 34-35), which  
7 statement expressly describes Kubel as “president or other officer or an authorized  
8 agent of” Debtor.

9 In addition, this court can exercise personal jurisdiction over Kubel under the  
10 “minimum contacts” test for due process. “[T]he constitutional touchstone’ of the  
11 determination whether an exercise of personal jurisdiction comports with [the Due  
12 Process Clause of the Fourteenth Amendment] ‘remains whether the defendant  
13 purposefully established ‘minimum contacts’ in the forum State.’” *Asahi Metal Indus.*  
14 *Co., Ltd. v. Superior Ct of California*, 480 U.S. 102, 108-09, 107 S.Ct. 1026 (1987).  
15 “The Due Process analysis requires that: (1) the defendant has sufficient ‘minimum  
16 contacts’ with the United States as a whole; and (2) the exercise of jurisdiction is  
17 ‘reasonable’ such that it would not offend ‘traditional notions of fair play and substantial  
18 justice.’” *In re Bozel*, 434 B.R. 86, 98 (Bankr. S.D.N.Y. 2010) (*quoting id.*).

19 **1. Minimum contacts: general jurisdiction.**

20 “[M]inimum contacts must have a basis in ‘some act by which the defendant  
21 purposefully avails itself of the privilege of conducting activities within the forum State,  
22 thus invoking the benefits and protections of its laws.’” *Asahi*, 480 U.S. at 109 (*quoting*  
23 *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174 (1985)). “[I]n the  
24 context of bankruptcy proceedings, the minimum contacts analysis should evaluate the  
25 defendant’s contacts with the United States as a whole, not merely contacts with the  
26 forum state.” *Bozel*, 434 B.R. at 99.

27 Here, Kubel is the 100% owner of Debtor, a limited liability company organized  
28 under the laws of the United States. See dkt. 1, pp. 26; 34-35. The address listed for

1 Kubel in Debtor's Statement of Financial Affairs is in Redondo Beach, California. See  
2 dkt. 1, p. 26. This court is also informed, and Kubel has not disputed, that he is involved  
3 in state court litigation pending in Georgia. See dkt. 51, p. 10:27-11:3. Additionally, "the  
4 Supreme Court has recognized that a defendant's status as a...corporate officer 'does  
5 not somehow insulate them from jurisdiction.'" *Bozel*, 434 B.R. at 99 (*quoting Calder v.*  
6 *Jones*, 465 U.S. 783, 790, 104 S.Ct. 1482 (1984)). The mere fact that Kubel's contacts  
7 with the United States may pertain only to his status as an owner/officer of certain  
8 companies/corporations does not prevent this court from exercising jurisdiction over him  
9 personally.

10 Kubel's residential status in Austria also does not prevent this court from finding  
11 that Kubel has established minimum contacts for purposes of the Due Process Clause.  
12 See *Burger King*, 471 U.S. at 476; *Calder*, 465 U.S. at 787. Thus, Kubel has  
13 established contact with at least two states, and by availing himself of the protections  
14 and privileges associated with doing business under the laws of the United States, he  
15 cannot now evade the jurisdiction of the United States' court system.

16 **2. Minimum contacts: specific jurisdiction.**

17 Even if general jurisdiction were not adequately established, this court has  
18 specific jurisdiction over Kubel. "Specific jurisdiction is proper where the action 'arises  
19 out of' the defendant's contacts with the forum, and where the defendant 'purposefully  
20 availed' itself of the 'privilege of conducting activities within the forum...invoking the  
21 benefits and protections of its laws.'" *Bozel*, 434 B.R. at 100 [citations omitted]. For the  
22 reasons set forth above, because this action arises out of Kubel's choice to have Debtor  
23 file a bankruptcy petition in this court, and his concomitant and resulting duties as the  
24 owner of Debtor and his related contacts with the United States, specific jurisdiction  
25 over Kubel has been established.

26 **3. Reasonableness.**

27 "The Supreme Court has stated that the reasonableness inquiry involves  
28 evaluating (1) 'the burden on the defendant;' (2) 'the forum['s]...interest in adjudicating

1 the dispute;’ and (3) ‘the plaintiff’s interest in obtaining convenient and effective relief.’”  
2 *Id.* (quoting *Burger King*, 471 U.S. at 477). This court finds the exercise of personal  
3 jurisdiction over Kubel reasonable under the circumstances.

4 With regard to the burden on Kubel, this court has reviewed the requests for  
5 production of documents set forth in the Examination Motion and finds they are not  
6 overburdensome. This court is further persuaded that the examination of Kubel need  
7 not be unduly burdensome. For example, it may be feasible to arrange to examine  
8 Kubel via video conference without making him leave his locality.

9 As to this court’s interest in adjudicating the dispute, the dispute involves Debtor,  
10 a limited liability company organized under the laws of the United States, and the  
11 motion involves issues of United States bankruptcy law. Therefore, this court is better  
12 suited to hear this dispute than courts in other forums.

13 With regard to Movant’s interest in obtaining convenient and effective relief, this  
14 court is informed that Debtor’s records were sent to Austria, presumably to Kubel, and  
15 Kubel has not disputed that assertion. See *dk.* 42-1, p. 2:24-25. Moreover, it appears  
16 that the (former?) managing member of Debtor, Scarrett, might no longer be actively  
17 involved with Debtor. See *dk.* 43-5, p. 28. Accordingly, the examination of Kubel  
18 appears to be the only means by which Movant can obtain “effective” relief.

19 Having established that this court does have personal jurisdiction over Kubel,  
20 Local Bankruptcy Rule 9020-1(e)(2) does not require personal service of the OSC on  
21 Kubel. What was required, however, was that the Examination Motion and the  
22 Contempt Motion were to be served in the manner of a summons and complaint  
23 pursuant to Fed. R. Bankr. P. 9014(b). Service via regular mail of those documents is  
24 generally permissible for domestic recipients, but special requirements apply to  
25 overseas recipients. See Fed. R. Bankr. P. 7004.

26 Contrary to Kubel’s assertions at p. 6:1-2 of the Opposition, Austria is not a party  
27 to the Hague *Service* Convention, so service upon Kubel need not comply with those  
28 requirements. See U.S. Department of State, Bureau of Consular Affairs, Legal

1 Considerations, [http://www.travel.state.gov/travel/english/legal-](http://www.travel.state.gov/travel/english/legal-considerations/judicial/country/austria.html)  
2 [considerations/judicial/country/austria.html](http://www.travel.state.gov/travel/english/legal-considerations/judicial/country/austria.html) (last visited Jan. 7, 2015). Other  
3 requirements may apply, e.g., letters rogatory. See *id.*

4 This court is cognizant of legitimate reasons for wanting to avoid the expense of  
5 being called into overseas litigation, including overseas travel to conduct litigation and  
6 discovery. The parties are assured that such considerations will be taken into account  
7 in this courts' control over discovery and other procedures, should such measures prove  
8 necessary.

#### 9 **D. FUTURE SERVICE ON KUBEL**

10 While this court's OSC required service upon Kubel via international mail, that  
11 language was not intended to be a ruling as to sufficiency of future service. In contested  
12 matters such as this, motions must be served in the manner provided for service of a  
13 summons and complaint by Fed. R. Bankr. P. 7004 (see Fed. R. Bankr. P. 9014(b)).  
14 Going forward, Movant must therefore comply Fed. R. Civ. P. 4(f) governing service on  
15 individuals in a foreign country (incorporated by Fed. R. Bankr. P. 7004(a)(1)) and all  
16 other applicable service requirements set forth in Fed. R. Bankr. P. 7004 and Fed. R.  
17 Civ. P. 4. Likewise, Kubel must be mindful of Fed. R. Civ. P. 4(d) (incorporated by Fed.  
18 R. Bankr. P. 7004(a)(1)), which places an affirmative duty on respondents to "avoid  
19 unnecessary expenses of serving" a motion. This court may impose fee shifting if  
20 evidence is presented demonstrating that Kubel makes service unnecessarily  
21 expensive.

#### 22 **E. CONCLUSIONS**

23 For the reasons set forth above, Movant is directed to lodge proposed orders  
24 reflecting the following conclusions of this court:

25 (1) The Contempt Motion is denied **only as to Kubel** because, on the present  
26 record, this court is not persuaded that he received sufficient notice of the  
27 Examination Motion or the Examination Order.

28 (2) The OSC is discharged **only as to Kubel**.



1 (3) The Contempt Motion is granted **only as to Debtor**.

2 (4) Debtor and its principals, managers, and members, shall produce the  
3 documents, electronically stored information, and tangible things described in  
4 the Examination Order responsive to the categories of documents,  
5 electronically stored information, and tangible things in Exhibit B to the  
6 Examination Motion that are in its or its principals,' managers,' or members'  
7 possession, custody, or control. The production shall be made to counsel for  
8 Insituform at Thompson Coburn LLP, Attn: Brian W. Hockett & Helen B. Kim,  
9 2029 Century Park East, 19th Floor, Los Angeles, CA 90067, on or before  
10 twenty-one (21) days after entry of the order on the Contempt Motion.

11 (5) Should Debtor fail to produce the documents, electronically stored  
12 information, and tangible things on or before twenty-one (21) days after entry  
13 of the order on the Contempt Motion, Debtor will be sanctioned \$100 per day  
14 payable to the Clerk of Court for the United States Bankruptcy Court for the  
15 Central District of California until the contempt is purged or the court orders  
16 otherwise. (This court is cognizant that monetary sanctions might only harm  
17 Debtor's creditors by depleting the assets, if any, of the bankruptcy estate.)  
18 Accordingly, this court reserves for future determination whether such  
19 sanctions should be subordinated to creditor claims and/or whether any other  
20 person or entity should be jointly and severally liable with Debtor.

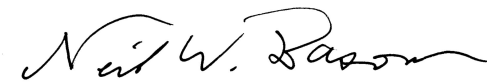
21 (6) This court reserves for a future date a determination regarding what additional  
22 consequences might flow from Debtor's contempt, which might include  
23 evidentiary presumptions or other sanctions beyond any monetary sanctions.

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1 (7) Debtor and its principals, managers, and members shall produce their person  
2 most knowledgeable to testify in response to the Examination Motion and the  
3 Examination Order. To the extent necessary, the court directs the parties to  
4 meet and confer regarding the most cost-effective means of effectuating  
5 service of a revised Examination Motion on Kubel, keeping in mind Fed. R.  
6 Civ. P. 4(d)(1) (incorporated by Fed. R. Bankr. P. 7004(a)(1)), should Movant  
7 file and serve such revised Examination Motion. The parties are encouraged  
8 to explore mediation or other alternative dispute resolution methods that may  
9 be less costly and more efficient in resolving this matter.

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25 Date: February 6, 2015



Neil W. Bason  
United States Bankruptcy Judge